FARM COMMUNITY TRUST v CLAUDIOUS CHEMHERE

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & OMERJEE AJA
HARARE, JULY 3, 2012 & JUNE 17, 2013

L Uriri, for the appellant
No appearance for the respondent

GOWORA JA: This is an appeal against the decision of the Labour Court in which it dismissed an appeal by the appellant against an award made by an arbitrator directing the appellant to reinstate the respondent without loss of salary or benefits, and, in the event that reinstatement was no longer possible, pay damages.

The background to this matter is as follows. The respondent was employed as a security guard at the appellant's premises in Marlborough. During the morning of 13 June 2009 it was discovered that approximately thirty five (35) litres of diesel had been stolen from one of the appellant's trucks parked on the premises. Following an investigation conducted by the appellant, the respondent was charged with theft in terms of the National Code of Conduct Regulations, S.I. 15/06 ("the National Code of Conduct"). On 1 July 2009 the respondent was informed that he had been found guilty and that consequently his contract had been terminated with effect from 23 June 2009.

Aggrieved by the decision to dismiss him, the respondent appealed to the appellant's executive director. The appeal was unsuccessful and the respondent was advised accordingly on 10 July 2009. The respondent was further advised that he could appeal to the

appellant's Board of Trustees within seven working days if he so wished. On 16 July 2009 the respondent prepared his appeal but it was only date stamped on 24 July 2009 at GAPWUZ where one of the Trustees is employed. Although it is not clear what GAPWUZ stands for, it would appear to be the workers' union headquarters. There was no response to the appeal. On 18 August 2009 the respondent then wrote a letter to the Labour Officer complaining that his appeal had not been heard and asking for a fair hearing. Following a certificate of no settlement, the Labour Officer then referred the matter for arbitration on the issue whether or not the dismissal of the respondent was fair.

The arbitrator found that the failure by the board of trustees of the appellant to determine the appeal within fourteen days infringed the respondent's right to be heard and was thus a breach of the rules of natural justice. He also found that the respondent had a legitimate expectation to have his appeal heard by the board of trustees and the fact that the appeal had still not been determined was unprocedural rendering the dismissal null and void. The arbitrator then gave an award for the reinstatement of the respondent to his position with effect from 23 June 2009 without loss of salary or benefits and alternatively the payment of specific sums of damages. Not satisfied with the award the appellant noted an appeal with the Labour Court.

In its judgment the Labour Court found, firstly, that the arbitrator had made a factual finding that the appeal by the respondent had not been heard by the appellant's appellate body and, secondly, that the failure to determine the appeal rendered the dismissal null and void. Consequently, the Labour Court concluded that the finding by the arbitrator that the dismissal was unfair was an issue of fact and not one of law. In the result, the court ruled that the appeal was not properly taken and on that basis dismissed the appeal. Against that finding the appellant has now appealed to this Court.

In its grounds of appeal, the appellant has attacked the decision of the Labour Court on three bases. These are:

(a) That the court *a quo* erred in concluding that the appeal before it did not raise points of law;

(b) That the court *a quo* erred in concluding that the dismissal of the respondent had been effected in accordance with the law and thus could not be termed unfair.

(c) That the learned President of the Labour Court had misdirected herself in disregarding the points raised by the appellant in its appeal before that court.

At the hearing of this appeal, there was no appearance for the respondent. For the appellant, Mr *Uriri*, submitted that the learned president in the court *a quo* erred in concluding that the appeal by the appellant to the Labour Court did not raise points of law. In particular, he argued that the arbitrator had erred in failing to appreciate that the respondent had failed to exhaust internal remedies before approaching the Ministry of Labour. He argued further that the arbitrator had erred in "quantifying" damages due to the respondent without hearing evidence on the issueof mitigation of damages by the respondent. He further submitted that the learned arbitrator had erred in setting out damages to be paid to the respondent without advancing any reasons or justification for the award.

An appeal from the Labour Court to the Supreme Court, with leave of the Labour Court or the Supreme Court, lies only on a point of law. What constitutes a point of law was described in *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) in the following terms:

> "The twin concepts, questions of law and questions of fact were considered in depth by E M GROSSKOPF JA in Media Workers Association of South Africa &Ors v Press Corporation of South Africa Ltd (Perskor) 1992 (4) SA 791 (A). Approving the discussion of the topic in Salmond on Jurisprudence 12 ed at 65-75, the learned

> JUDGE OF APPEAL pointed out at 795D-G that the term "question of law" is used in three distinct though related senses. First, it means "a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter". Second, it means "a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of the law is on a certain matter". And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors."

See also the remarks of GARWE JA in *Sable Chemical Industries Limited v David Peter Easterbrook* SC 18/10.

The respondent's complaint against the appellant before the arbitrator was effectively that his dismissal had been effected outside the provisions of the Labour National Employment Code of Conduct, S.I. 15 of 2006, thus constituting an unfair dismissal. What constitutes an unfair dismissal has been defined in s 12B of the Labour Act, [*Cap. 28:01*]. That section provides in relevant part as follows:

> "(1) …
> (2) An employee is unfairly dismissed-
> (a) If, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
> (b) In the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9)".

It is common cause that in this case the respondent was charged with misconduct in accordance with the National Code of Conduct. Section 8(2) of the National Code of Conduct provides as follows:

> "An internal appeal structures (sic) shall be limited to not more than two appeal authorities."

An aggrieved party is therefore entitled to appeal to two bodies within the employment structure. The respondent has alleged failure on the part of the appellant to

afford him an opportunity to have the second appeal determined. The arbitrator found that this failure was unprocedural rendering the dismissal null and void.

In *Sable Chemical Industries Limited v David Peter Eastbrook* (supra) this Court had to consider whether or not failure to comply with the procedures provided for in codes of conduct would vitiate the proceedings in question. This is what GARWE JA stated at p 8-9 of the cyclostyled judgment:

> "It is true that proceedings before disciplinary hearing committees established under a code of conduct are intended to be flexible and less formal than proceedings in a court of law. Various decisions of the High Court and Supreme Court in this jurisdiction have stressed the need for flexibility in these circumstances. Those same decisions have stressed the need for a fair hearing and in particular for the *audi alteram partem* rule to be observed. It is not part of our law that tribunals can, under the guise of flexibility, violate the principle of fairness and do so with impunity."

The appellant contends that the arbitrator should not have entertained the dispute as the respondent had not exhausted the internal domestic remedies available to him under the National Code of Conduct. The respondent did file an appeal to the Board of Trustees of the appellant. If one goes by the stamp from GAPWUZ as being the correct date that the appeal was noted, it is evident that he did so on 24 July 2009. The complaint to the Labour Officer was only lodged on 18 August 2009 a period of over three weeks from the date that the appeal had been noted. The matter was referred to compulsory arbitration on 30 September 2009 and even as at that date the appeal had not been determined.

It was argued on behalf of the appellant that the learned president of the Labour Court misdirected herself in concluding that the appeal did not raise issues of law and that as a consequence it was not properly before her. In my view, the appeal to the Labour Court raised two issues; firstly whether the respondent had been dismissed unfairly, and

secondly, whether the award of damages by the arbitrator had been properly quantified. The second issue certainly raised a question of law. The learned President in the court *a quo* concluded that no issues of law had been raised.

I entertain no doubt that the learned President in the court *a quo* misdirected herself in concluding that the entire appeal was not properly before her as it did not raise issues of law. The issue before the court was whether or the arbitrator had followed the law in the quantification of damages in *lieu* of reinstatement. This ground is concerned with issues of law. The appeal as it related to the quantification of damages was therefore properly before the court for determination.

On the issue of damages, it is common cause that neither party adduced evidence before the arbitrator. It is settled law that damages are meant to place the employee in the position he would have occupied had the contract of employment not been terminated, subject to the duty upon him to mitigate his loss. Evidence on the quantum of damages due to an employee following the unlawful termination of employment must be adduced to enable a proper quantification to be made. See the remarks of GUBBAY CJ in *Ruturi v Heritage Clothing (Pvt) Ltd (1994) (2) ZLR 374 (S); to the following effect:*

> "In so far as the award of damages is concerned, it is apparent that no evidence was at any stage. The Tribunal did not have recourse, as it ought to have, to s18 (1) of the Labour Relations (Settlement of Disputes) Regulations 1993 (SI 30 of 1993), which empowers it to require any witnesses to give evidence on oath or affirmation. ……..
> For these reasons, the award must be set aside, for to quantify damages, or indeed making any finding, on no evidence, is to err in law. See R v Birmingham Compensation Appeal Tribunal, Ex p Road Haulage Executive [1952] 2 All ER 100 (QB) at 101F; Wade Administrative Law 6 ed at p320; de Smith Judicial Review of Administrative Action 4 ed at p 133."[1]

[1] At p 380B-F

The appellant has submitted, as it did before the Labour Court, that the error by the learned arbitrator in quantifying damages in the absence of evidence was to err at law in which event the appeal against the award of damages was on a question of law. I agree.

Consequently, in dismissing the appeal on the grounds that it had not been properly placed before it, the Labour Court misdirected itself for the reasons given above.

It is appropriate therefore that the matter be remitted to the court *a quo* for the quantification of damages.

Accordingly the appeal succeeds and the order of the court *a quo* is set aside.

It is ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the labour court is hereby set aside.
3. The matter is hereby remitted to the Labour Court for a proper quantification of the damages due.

GARWE JA: I agree

OMERJEE AJA: I agree

Kantor & Immerman, appellant's legal practitioners